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16

17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**
19 **WESTERN DIVISION**

20 FULFILLIUM, INC.,

21 Plaintiff,

22 v.

23 RESHAPE MEDICAL, LLC and
24 RESHAPE LIFESCIENCES,
25 INC.

Defendants.

Case No. 8:18-cv-01265-RGK-PLA

**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT ON THE
ISSUE OF INFRINGEMENT**

Date: August 12, 2019

Time: 10 a.m.

Place: Roybal Building, Courtroom
780

Judge: Hon R. Gary Klausner

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PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OF
INFRINGEMENT

8:18-CV-1265-RGK-PLA

1 Plaintiff Fulfillium, Inc. respectfully submits this memorandum in support of
2 its Motion for Partial Summary Judgment of Infringement. Fulfillium seeks
3 summary judgment that Defendants ReShape Medical, LLC and ReShape
4 Lifesciences, Inc. have infringed independent claim 1 of each of U.S. Patent Nos.
5 9,445,930 (the “‘930 patent”); 9,808,367 (the “‘367 patent”); and 9,456,915 (the
6 “‘915 patent”) (collectively the “Patents-in-Suit”) as well as claims 5, 6, and 11 of
7 the ‘930 patent and claim 7 of the ‘367 patent. Fulfillium’s Motion is supported by
8 a L.R. 56-1 Statement of Uncontested Facts and Conclusions of Law (“SUF”)
9 as well as the Declarations of W. Cook Alciati and Dr. Sunil Bhoyrul. Dr. Bhoyrul
10 is a bariatric surgeon who is skilled in the pertinent art.

11 **INTRODUCTION**

12 Defendants did not serve a substantive noninfringement position until after
13 the close of discovery. To avoid motion practice, Fulfillium agreed to accept
14 service of those contentions. When Fulfillium finally discovered Defendants
15 noninfringement positions, Fulfillium learned that they were all premised on
16 Defendants unsupported attempt to manufacture a noninfringement defense by
17 reading limitations into the claims that are not recited in the claims. There is no
18 basis in the intrinsic record or otherwise for Defendants’ proposed constructions.

19 Defendants are forced to contrive limiting claim constructions because they
20 infringe the Patents-in-Suit when those patents are properly understood according
21 to their plain and ordinary meaning. Indeed, Defendants largely admitted that all
22 elements of the claims in the Patents-in-Suit are literally present in the accused
23 device during their Rule 30(b)(6) deposition. Defendants are bound by those
24 admissions. No reasonable jury could find that the accused devices do not include
25 each and every element of claim 1 of the each of the Patents-in-Suit. Summary
26 judgment of infringement is appropriate in this case.

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PLAINTIFF’S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OF
INFRINGEMENT

8:18-CV-1265-RGK-PLA

1 **STATEMENT OF FACTS**

2 **A. The Patents-in-Suit**

3 The Patents-in-Suit are all directed to a gastric balloon device. Bhoyrul Decl.

4 ¶ 14. A gastric balloon device is a non-surgical treatment for obesity which is
5 inserted endoscopically into the patient's stomach. *Id.* Once the device is within
6 the patient's stomach, it is inflated with a fluid, such as saline. *Id.* The inflated
7 device occupies space in the stomach, leading to a sense of satiety. *Id.* With the
8 patient feeling sated, the patient will consume less calories and lose weight. *Id.*

9 The specification explains that "the present disclosure provides improved
10 gastric balloons and methods for their deployment and use." *See, e.g.*, '915
11 patent, Col. 8, ll. 59-60. The specification
12 discloses various embodiments of a gastric
13 balloon structure. One such embodiment
14 discloses a dual balloon structure in which the
15 balloons are connected by a flexible spine.

16 That embodiment is shown in Fig. 15F (right).

17 As can be seen, the device includes two

18 balloons 1540 and 1542 that are

19 connected with a flexible central

20 spine. This design is substantially

21 similar to the design of a prototype

22 device Fulfillium developed in the

23 early 2000s (shown to the right). In

24 the potential commercial embodiment of Fulfillium's gastric balloon technology,

25 the device includes two balloons connected by a flexible spine that allows the

26 gastric balloon structure to conform to the shape of the gastric cavity.

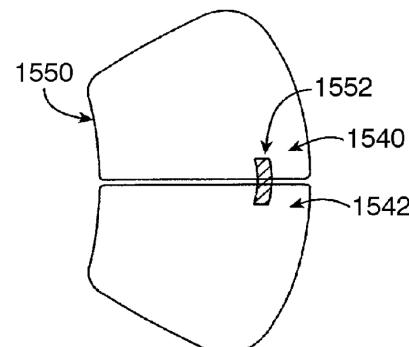
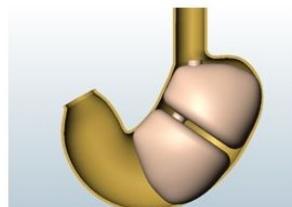


FIG. 15F

Current Thoughts on Product Design

Alternative designs.



Basic features

- Follows our patent principles
- >1 balloons
- Intermediate stage of "holding" food

Others...

1 Independent claim 1 of each of the Patents-in-Suit is generally directed to a
2 gastric balloon structure including multiple balloons connected by a flexible central
3 spine with the structure conforming to a curved shape in the patient's stomach. The
4 dual balloon design enhances the safety of the device as well as patient comfort.

5 **B. Accused Products**

6 Defendants sold a gastric balloon device between 2016 and 2018 that
7 infringed the Patents-in-Suit. SUF, ¶ 2. The device has been called two different
8 names, but there is no material difference
9 between the two differently named devices as
10 it relates to this litigation. *Id.* ¶ 3. The
11 infringing devices will be referred to herein as
12 the "ReShape Balloon." The structure of the
13 ReShape Balloon is substantially similar to the
14 embodiments of the Fulfillium balloon
15 depicted above. An image from the ReShape Balloon Instructions for Use is
16 reproduced to the right. The ReShape Balloon "is a temporary implant designed to
17 facilitate weight loss by occupying space in the stomach." *Id.* ¶ 13. "The device's
18 flexible dual balloon design is intended to improve patient comfort while reducing
19 the risk of device migration into the intestine." *Id.* ¶ 59. In particular, the two
20 interconnected balloons are designed to better fit the natural contour of the stomach,
21 thereby increasing the level of patient comfort. *Id.* ¶ 57.



22 **C. The Parties**

23 Dr. Richard Chen founded Fulfillium in 2004 to commercialize his ideas
24 concerning an improved gastric balloon. SUF, ¶ 4. In 2005, Dr. Chen embarked
25 on an effort to seek funding for Fulfillium from venture capital firms, including SV
26 Lifesciences (the original investor in ReShape). *Id.* ¶¶ 60, 61.

1 In 2005, Dr. Chen sent to SV a copy of analysis conducted by Fulfillium that
2 “practically outline[d] the design specs for the next generation of the product,
3 form[ed] the basis for Fulfillium’s IP, and represent[ed] the fruits of [Dr. Chen’s]
4 labors over the past years.” SUF, ¶ 48. Upon providing such information, Dr. Chen
5 stated: “I trust that they will be kept confidential and, in the event there is no deal,
6 destroyed.” *Id.*

7 SV intended to partner with Intersect Partners LLC, which was managed by
8 one their venture partners, George Wallace. *Id.* ¶¶ 62, 63. [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 *Id.* Fulfillium, SV, and Intersect were unable to agree upon terms at which point
12 SV and Intersect decided to fund and form Abdominis, Inc. with Mr. Wallace as the
13 Chief Executive Officer. *Id.* ¶¶ 64, 65.

14 In connection with the funding of Abdominis, [REDACTED]
15 [REDACTED] *Id.* ¶ 65. [REDACTED]
16 [REDACTED]
17 *Id.* ¶¶ 65-67. [REDACTED]
18 [REDACTED] *Id.* ¶ 67.

19 Plainly put, when SV and Intersect could not reach a deal with Fulfillium,
20 they decided to launch their own gastric balloon company all while keeping Dr.
21 Chen and Fulfillium in the dark on their plan to launch a competitive company
22 based on the confidential information disclosed by Fulfillium. *See, e.g.*, ¶¶ 68-72.
23 [REDACTED]
24 [REDACTED] *Id.*

25 In the years following the formation of Abdominis, the name was changed to
26 ReShape Medical. *Id.* ¶ 73. At a Board of directors meeting in 2009, ReShape
27 discussed [REDACTED] *Id.* ¶ 74. [REDACTED]
28

1 [REDACTED] In fact,
2 Defendants admitted during the Rule 30(b)(6) [REDACTED]
3 [REDACTED] SUF, ¶ 75. Indeed, [REDACTED]

4 [REDACTED]
5 [REDACTED] SUF, ¶¶ 75-
6 76. Despite that intimate knowledge of Fulfillium's intellectual property
7 Defendants charged ahead to commercialize Fulfillium's gastric balloon
8 technology.

9 **LEGAL STANDARDS**

10 Summary judgment is appropriate when there is no genuine issue of material
11 fact for trial. Fed. R. Civ. P. 56(c). "By its very terms, this standard provides that
12 the mere existence of *some* alleged factual dispute between the parties will not
13 defeat an otherwise properly supported motion for summary judgment; the
14 requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty*
15 *Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (original emphasis).

16 "An infringement issue is properly decided upon summary judgment when
17 no reasonable jury could find that every limitation recited in the properly construed
18 claim either is or is not found in the accused device either literally or under the
19 doctrine of equivalents." *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1339 (Fed. Cir.
20 2001). "Where the only dispute is about the proper claim construction, summary
21 judgment is appropriate." *Bragel Int'l, Inc. v. Kohls's Dept. Stores, Inc.*, No. 2:17-
22 cv-07414-RGK-SS, 2019 WL 1425058, at *2 (C.D. Cal. Jan. 25, 2019).

23 "A determination of infringement requires a two-step analysis." *Gart*, 254
24 F.3d at 1339. First, the claim must be construed. *Id.* Second, "the claim as properly
25 construed must be compared to the accused device or process." *Id.* "In order for a
26 court to find infringement, the plaintiff must show for the presence of every ...
27 limitation or its substantial equivalent in the accused device." *Id.* Claim

1 construction is an issue of law, and infringement is a question of fact.” *Id.*

2 **ARGUMENT**

3 **A. The claim terms of the Patents-in-Suit are all properly
4 understood according to their plain and ordinary meaning.**

5 “It is the claims that define the metes and bounds of the patentee’s invention.”

6 *Thorner v. Sony Computer Entmt.*, 669 F.3d 1362, 1367 (Fed. Cir. 2012). “The
7 patentee is free to choose a broad term and expect to obtain the full scope of its
8 plain and ordinary meaning unless the patentee explicitly redefines the term or
9 disavows its full scope.” *Id.* A patentee can explicitly redefine a term through
10 lexicography, which requires a patentee to “clearly set forth a definition of the
11 disputed claim term other than its plain and ordinary meaning.” *Id.* at 1365. “It is
12 not enough for a patentee to simply disclose a single embodiment or use a word in
13 the same manner in all embodiments, the patentee must clearly express an intent to
14 define the term.” *Id.* A patentee can also limit claim scope through disavowal.
15 Like lexicography, “the standard for disavowal is similarly exacting.” *Id.* “To
16 constitute disclaimer, there must be a clear and unmistakable disclaimer.” *Id.* at
17 1366-67.

18 Despite relying on claim constructions that depart from the ordinary meaning
19 of the claim terms, Defendants did not offer any proposed constructions until the
20 last day of discovery. SUF, ¶ 80. Defendants thereafter supplemented their
21 response after the close of discovery on July 2, 2019. *Id.* ¶ 81. When Defendants
22 finally did take a position, they revealed claim constructions that would rewrite the
23 claims in various ways that are not supported by the facts or law. Defendants cite
24 to no clear and unmistakable disclaimer that would support their narrowing
25 constructions. Absent such disclaimer, the claim terms are presumed to have their
26 ordinary meaning. In this case, the words of the claims are easily understood by
27 lawyers, judges, and jurors alike without the need for specific construction. *Phillips*

1 *v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) (en banc).

2 **B. Defendants infringe independent claim 1 of each of the Patents-
3 in-Suit.**

4 **1. Defendants infringe the '930 Patent**

5 **a. Preamble**

6 The preamble of claim 1 of the '930 patent recites: "An obesity treatment
7 device for deploying in a stomach of patient, comprising." SUF, ¶ 8. To the extent
8 the preamble is limiting, it is met because the ReShape Balloon is a device used to
9 treat obesity that is deployed in the stomach of the patient. SUF, ¶ 13; Bhoyrul
10 Dec., ¶¶ 23-24.

11 **b. First element**

12 The first element of claim 1 of the '930 patent recites "a plurality of adjacent,
13 spaced-apart inflatable space-filling compartments, wherein each compartment of
14 the plurality of inflatable space-filling compartments has a respective inflated state
15 volume that is maintained during treatment of the patient." SUF, ¶ 8. A POSITA
16 would understand the words of this claim limitation according to their plain and
17 ordinary meaning without the need for further construction. Bhoyrul Dec., ¶ 26.

18 A POSITA would recognize this claim limitation as literally present in the
19 ReShape Balloon. *Id.*, ¶¶ 27-34. The ReShape Balloon includes "two
20 independently inflated, non-communicating, silicone balloons tethered to a central
21 silicone shaft." SUF, ¶ 14; Bhoyrul Dec., ¶ 28. A POSITA would understand that
22 the two balloons, which are located next to each and inflated after the device is
23 implanted in the stomach, to constitute "a plurality of adjacent, spaced-apart
24 inflatable filling compartments." Bhoyrul Dec., ¶ 29.

25 Each of the two balloons of the ReShape Balloon is inflated to a specified
26 volume. SUF, ¶ 15. Once inflated, that volume is maintained during treatment of
27 patient by, for example, the valve system discussed below. SUF, ¶ 15; Bhoyrul
28

1 Dec., ¶¶ 30-33. A POSITA would understand this to meet the requirement that
2 “each compartment of the plurality of inflatable space-filling compartments has a
3 respective inflated state volume that is maintained during treatment of the patient.”
4 Bhoyrul Dec., ¶¶ 30-34.

5 **c. Second element**

6 The second element of claim 1 of the ‘930 patent recites: “a valve system for
7 introducing a fluid into each compartment of the plurality of inflatable space-filling
8 compartments and for retaining, upon inflation, fluid in the plurality of inflatable
9 space-filling compartments, wherein” SUF, ¶ 8. A POSITA would understand the
10 words of this claim limitation according to their plain and ordinary meaning without
11 the need for further construction. Bhoyrul Dec., ¶ 36.

12 A POSITA would recognize this claim limitation as literally present in the
13 ReShape Balloon. *Id.*, ¶¶ 37-46. The ReShape Balloon includes [REDACTED]
14 [REDACTED] through which fluid flows. SUF, ¶ 17; Bhoyrul Dec.,
15 ¶¶ 38-43. The fluid flows through the valves and into the two balloons of the
16 ReShape Balloon. SUF, ¶¶ 18-20; Bhoyrul Dec. ¶¶ 40-44. Once the fluid flows
17 through [REDACTED], it does not flow back out of the
18 ReShape Balloon. SUF, ¶¶ 18-22; Bhoyrul Dec. ¶ 45. Following the filling of the
19 balloons with fluid through the valves, a valve sealant is injected to seal the [REDACTED]
20 [REDACTED]. SUF, ¶ 22; Bhoyrul Dec. ¶ 44. This valve sealant further ensures that fluid
21 cannot flow out of [REDACTED]. Bhoyrul Dec. ¶ 45.

22 A POSITA would understand [REDACTED], and fill
23 tubes to constitute a valve system. The valve system is sealed with valve sealant,
24 which can be considered part of the valve system. Bhoyrul Dec. ¶ 22. The valve
25 system retains the fluid in the ReShape Balloon once the balloons of the device
26 are inflated. *Id.* ¶ 23. Indeed, common sense requires such a function.

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d. Third element.

The third element of claim 1 of the '930 patent recites: "the valve system comprises a respective valve structure for introducing fluid into each inflatable space-filling compartment of the plurality of inflatable space-filling compartments, wherein each respective valve structure includes at least a first valve in series with a second valve;" SUF, ¶ 8. A POSITA would understand the words of this claim limitation according to their plain and ordinary meaning without the need for further construction. Bhoyrul Dec., ¶ 48.

A POSITA would recognize this claim limitation as literally present in the ReShape Balloon. *Id.*, ¶¶ 47-49. The ReShape Balloon includes a valve structure

SUF, ¶ 82; Bhoyrul Dec. ¶

49.

e. **Fourth element.**

The fourth element of claim 1 of the ‘930 patent recites: “wherein the obesity treatment device is to form, upon at least partially filling the plurality of inflatable space-filling compartments, to a curved shape conforming to a natural three-dimensional kidney shape of the stomach such that an outer surface of the obesity treatment device aligns against greater and lesser curvatures of the stomach.” SUF, ¶ 8. A POSITA would understand the words of this claim limitation according to their plain and ordinary meaning without the need for further construction. Bhoyrul Dec., ¶ 51.

A POSITA would recognize this claim limitation as literally present in the ReShape Balloon. Bhoyrul Dec., ¶¶ 52-58. The ReShape Balloon is inflated after it is implanted into the patient's stomach. SUF, ¶ 14. When the device is inflated it takes a

1 curved shape [REDACTED]. SUF, ¶ 14; Bhoyrul Dec., ¶¶ 53-57.

2 When inflated, the ReShape Integrated Dual Balloon Assembly is designed to
3 occupy a significant portion of the stomach while conforming to the natural shape
4 and contour of the patient's stomach. SUF, ¶¶ 24-26, 49-57; Bhoyrul Dec. ¶¶ 53-
5 57. The [REDACTED]

6 [REDACTED]
7 SUF, ¶ 53; ¶¶ 49-59. Indeed, Defendants represented to their shareholders and the
8 SEC that "we believe that our device differentiates itself with two interconnected
9 balloons designed to better fit the natural contour of
10 the stomach, thereby increasing the level of patient
11 comfort." SUF, ¶ 57.

12 The outer surface of the left side of the balloon
13 aligns against the lesser curvature of the stomach and
14 the outer surface of the right side of the balloon aligns
15 against the greater curvature of the stomach as shown
16 in the animation ReShape includes with its patient
17 information guide. SUF, ¶ 37; Bhoyrul Dec., ¶¶ 54-
18 57. This is consistent with a radiograph showing the
19 device inside the patient's stomach. Bhoyrul Dec. ¶ 56.



Fig. 2

20 In sum, the foregoing establishes by a preponderance of the evidence that
21 each and every element of claim 1 of the '930 patent is literally present in the
22 ReShape Balloon when that claim is properly understood according to its plain and
23 ordinary meaning. No reasonable juror could find otherwise, and summary
24 judgment of infringement as to claim 1 of the '930 patent is therefore appropriate.

25 **2. Defendants infringe claim 1 of the '915 patent.**

26 **a. Preamble**

27 The preamble of claim 1 of the '915 patent recites: "A gastric balloon

1 structure for deploying in a gastric cavity of a patient, comprising.” SUF, ¶ 9. To
2 the extent the preamble is limiting, it is met because the ReShape Balloon is a
3 gastric balloon structure that is deployed in a gastric cavity of a patient. SUF, ¶ 28;
4 Bhoyrul Dec., ¶¶ 59-60.

5 **b. First element**

6 The first element of claim 1 of the '915 patent recites: “at least two isolated
7 non-concentric inflatable chambers, wherein each chamber of the at least two
8 isolated non-concentric inflatable chambers has a respective inflated state volume
9 such that deflation of any single chamber of the at least two isolated non-concentric
10 inflatable chambers leaves the inflated state volume of the remaining chambers of
11 the at least two isolated non-concentric inflatable chambers unaffected;” A
12 POSITA would understand the words of this claim limitation according to their
13 plain and ordinary meaning without the need for further construction. Bhoyrul
14 Dec., ¶ 62.

15 A POSITA would recognize this claim limitation as literally present in the
16 ReShape Balloon. Bhoyrul Dec., ¶¶ 63-66. The balloons of the ReShape Balloon
17 are inflatable chambers. SUF, ¶ 29; Bhoyrul Dec., ¶ 64. Each balloon has its own
18 specific inflated state volume. SUF, ¶ 15. The balloons are non-concentric at least
19 because they do not share a common center and would not fit within each other.
20 SUF, ¶ 30; Bhoyrul Dec., ¶ 66. The balloons of the ReShape Balloon are not in
21 fluid communication with each other. Bhoyrul Dec., ¶¶ 63-65. Accordingly, if one
22 deflates, the other will remain inflated. SUF, ¶ 31; Bhoyrul Dec., ¶¶ 64-65.

23 **c. Second element**

24 The second element of claim 1 of '915 patent recites “a valve system for
25 introducing a fluid into the at least two isolated non-concentric inflatable chambers
26 and for retaining upon inflation, the fluid in the at least two isolated non-concentric
27 inflatable chambers;” SUF, ¶ 9. A POSITA would understand the words of this

1 claim limitation according to their plain and ordinary meaning without the need for
2 further construction. Bhoyrul Dec., ¶ 68.

3 A POSITA would recognize this claim limitation as literally present in the
4 ReShape Balloon. Bhoyrul Dec., ¶¶ 69-76. The ReShape Balloon includes [REDACTED]
5 [REDACTED]. SUF, ¶ 17;
6 Bhoyrul Dec., ¶¶ 69-73. The fluid flows through the valves and into the two
7 balloons of the ReShape Balloon. SUF, ¶¶ 18-20; Bhoyrul Dec. ¶¶ 73-75. Once
8 the fluid flows through [REDACTED], it does not flow back
9 out of the ReShape Balloon. SUF, ¶¶ 18-22; Bhoyrul Dec. ¶¶ 71-76. Following the
10 filling of the balloons with fluid through the valves, a valve sealant is injected to
11 seal [REDACTED]. SUF, ¶ 22; Bhoyrul Dec. ¶ 76. This valve sealant further
12 ensures that fluid cannot flow out of [REDACTED] once fluid flows through it.
13 Bhoyrul Dec. ¶ 76.

14 A POSITA would understand the [REDACTED], and fill
15 tubes to constitute a valve system. Bhoyrul Dec. ¶ 75. The valve system is sealed
16 with valve sealant, which can be considered part of the valve system. *Id.* ¶ 76. The
17 valve system retains the fluid in the ReShape Balloon once the balloons of the
18 device are inflated. *Id.* ¶¶ 75-76.

19 **d. Third element**

20 The third limitation of claim 1 ‘915 patent recites “a flexible central spine
21 spanning a gap between and fixedly attached to both a first chamber of the at least
22 two isolated non-concentric inflatable chambers and a second chamber of the at
23 least two isolated non-concentric inflatable chambers.” SUF, ¶ 9. A POSITA
24 would understand the words of this claim limitation according to their plain and
25 ordinary meaning without the need for further construction. Bhoyrul Dec., ¶ 78.

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1 A POSITA would recognize this claim
2 limitation as literally present in the ReShape
3 Balloon. Bhoyrul Dec., ¶¶ 79-82. The
4 ReShape Balloon includes a “central silicone
5 shaft” that is attached to the balloons and
6 spans a gap between the two balloons. SUF,
7 ¶ 32; Bhoyrul Dec. ¶¶ 80-81. The central silicone shaft is flexible. *Id.*; *id.* The
8 flexible central silicone shaft runs through the length of the balloon device acting
9 as a spine. SUF, ¶ 35; Bhoyrul Dec. ¶¶ 80-81. The central silicone shaft connects
10 the two balloons in the ReShape Balloon. SUF, ¶ 33; Bhoyrul Dec. ¶¶ 80-81. The
11 above-picture from Defendants’ response to Interrogatory No. 5 [REDACTED]
12 [REDACTED] Alciati Decl., Ex. 34 at 7.

13 A POSITA would understand the “central silicone shaft” of the ReShape
14 Balloon to be a flexible central spine that is attached to the two balloons and that
15 spans a gap between the two balloons. Bhoyrul Dec., ¶¶ 79-81.

16 **e. Fourth element**

17 The fourth limitation of claim 1 ‘915 patent recites “wherein the gastric
18 balloon structure, in its inflated state, assumes a curved shape conforming to a
19 natural three-dimensional kidney shape of the gastric cavity, such that the flexible
20 central spine flexibly conforms, upon at least partially filling the at least two
21 isolated non-concentric inflatable chambers, the gastric balloon structure of the
22 natural three-dimensional kidney shape of the gastric cavity.” SUF, ¶ 9. A POSITA
23 would understand the words of this claim limitation according to their plain and
24 ordinary meaning without the need for further construction. Bhoyrul Dec., ¶ 84.

25 A POSITA would recognize this claim limitation as literally present in the
26 ReShape Balloon. Bhoyrul Dec., ¶¶ 85-87. The ReShape Balloon is inflated after
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28

1 it is implanted into the patient's stomach.
2 SUF, ¶ 14. When the device is inflated it
3 takes a curved shape as shown in the figure
4 to the right. SUF, ¶ 14; Bhoyrul Dec., ¶¶
5 51-57; 87. When inflated, the ReShape
6 Integrated Dual Balloon Assembly is
7 designed to occupy a significant portion of
8 the stomach while conforming to the
9 natural shape and contour of the patient's stomach.
10 SUF, ¶¶ 24-26; Bhoyrul Dec. ¶¶ 51-57; 87. As the
11 image on the right shows, the flexible central spine
12 of the ReShape device bends and conforms the
13 device to the shape of the patient's stomach. SUF,
14 ¶¶ 37-38, 49-59; Bhoyrul Dec. ¶ 86. In fact,
15 ReShape has represented that ReShape Balloon is
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

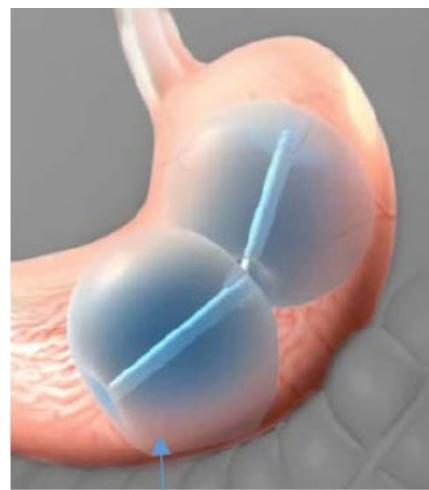
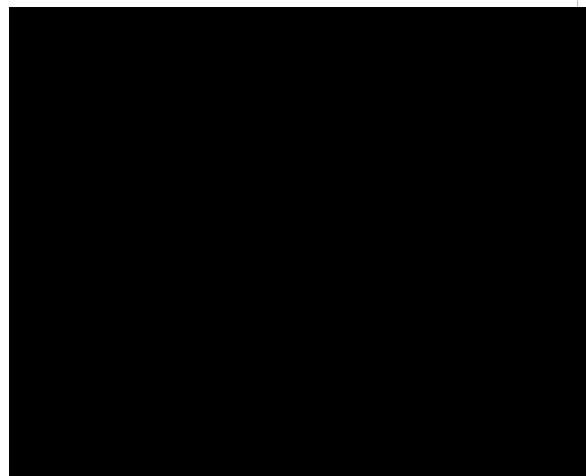


Fig. 2

19 SUF, ¶ 55.

20 **f. Fifth element.**

21 The fifth element of claim 1 of the '915 patent recites "wherein a respective
22 fluid volume for filling each chamber of the at least two isolated non-concentric
23 inflatable chambers is selected based upon dimensions of the gastric cavity of the
24 patient." SUF, ¶ 9. A POSITA would understand the words of this claim limitation
25 according to their plain and ordinary meaning without the need for further
26 construction. Bhoyrul Dec., ¶ 89.

27 A POSITA would recognize this claim limitation as literally present in the
28

1 ReShape Balloon. Bhoyrul Dec., ¶¶ 89-94. The inflation volume for the balloons
2 is determined, in part, based on the stature of the patients. SUF, ¶ 39; Bhoyrul Dec.,
3 ¶ 88. For patients over 64.5 inches in height, a fill volume of 450cc per balloon is
4 recommended. SUF, ¶ 41; Bhoyrul Dec., ¶ 91. For patients under 64.5 inches in
5 height, a fill volume of 375cc is recommended. SUF, ¶ 42; Bhoyrul Dec., ¶ 91. Dr.
6 Bhoyrul explains that “the dimensions of the patient’s stomach will, in part, depend
7 on the patient’s stature.” Bhoyrul Dec., ¶ 92. A skilled artisan would thus
8 understand that the fill volume of the balloons of the ReShape Balloon is based on
9 the size of the patient’s stomach. *Id.*

10 Additionally, the filling process of the balloons of the ReShape Balloon is
11 monitored through endoscopic visualization. SUF, ¶ 43; Bhoyrul Dec., ¶ 93-94.
12 This visualization allows the physician to determine whether the patient’s anatomy
13 can accommodate the minimal fill level of 375cc balloons. Bhoyrul Dec., ¶ 93-94.
14 If the physician determines that not be the case through the endoscopic
15 visualization, the place procedure is discontinued. *Id.* ¶ 94. This is yet another way
16 in which the fill volume is based on the dimensions of the patient’s gastric cavity.
17 *Id.*

18 In sum, the foregoing establishes by a preponderance of the evidence that
19 each and every element of claim 1 of the ‘915 patent is literally present in the
20 ReShape Balloon when that claim is properly understood according to its plain and
21 ordinary meaning. No reasonable juror could find otherwise, and summary
22 judgment of infringement as to claim 1 of the ‘915 patent is therefore appropriate.

23 **3. Defendants infringe claim 1 of the ‘367 patent.**

24 **a. Preamble**

25 The preamble of claim 1 of the ‘367 patent “A free floating, untethered
26 gastric balloon structure for deploying in a gastric cavity of a patient, comprising.”
27 SUF, ¶ 10. To the extent the preamble is limiting, it is met because the ReShape
28

1 Balloon is a free-floating, untethered gastric balloon structure that is deployed in a
2 gastric cavity of a patient. SUF, ¶¶ 44-45; Bhoyrul Dec., ¶¶ 95-98.

3 **b. First element**

4 The first element of claim 1 of the '367 patent recites "at least two isolated
5 non-concentric inflatable chambers, wherein each chamber of the at least two
6 isolated non-concentric inflatable chambers has a respective inflated state volume
7 such that deflation of any single chamber of the at least two isolated non-concentric
8 inflatable chambers leaves the inflated state volume of the remaining chambers of
9 the at least two isolated non-concentric inflatable chambers unaffected." SUF, ¶
10 10. A POSITA would understand the words of this claim limitation according to
11 their plain and ordinary meaning without the need for further construction. Bhoyrul
12 Dec., ¶ 100.

13 A POSITA would recognize this claim limitation as literally present in the
14 ReShape Balloon. Bhoyrul Dec., ¶¶ 101-105. A POSITA would understand the
15 two balloons of the ReShape Balloon to be inflatable chambers. SUF, ¶ 29; Bhoyrul
16 Dec., ¶ 64. The balloons are non-concentric at least because they do not share a
17 common center and would not fit within each other. SUF, ¶ 30; Bhoyrul Dec., ¶
18 104. The balloons of the ReShape Balloon are not in fluid communication with
19 each other. Bhoyrul Dec., ¶¶ 102-103. Accordingly, if one deflates, the other will
20 remain inflated. SUF, ¶ 31; Bhoyrul Dec., ¶ 105.

21 **c. Second element**

22 The second limitation of the claim 1 of the '367 patent recites "a valve system
23 for introducing a fluid into the at least two isolated non-concentric inflatable
24 chambers and for retaining, upon inflation, fluid in the at least two isolated non-
25 concentric inflatable chambers." SUF, ¶ 10. A POSITA would understand the
26 words of this claim limitation according to their plain and ordinary meaning without
27 the need for further construction. Bhoyrul Dec., ¶ 107.

1 A POSITA would recognize this claim limitation as literally present in the
2 ReShape Balloon. Bhoyrul Dec., ¶¶ 107-115. The ReShape Balloon includes [REDACTED]
3 [REDACTED] valves through which fluid flows. SUF, ¶ 17;
4 Bhoyrul Dec., ¶¶ 109-112. The fluid flows through the valves and into the two
5 balloons of the ReShape Balloon. SUF, ¶¶ 18-20; Bhoyrul Dec. ¶ 112-115. Once
6 the fluid flows through [REDACTED], it does not flow back
7 out of the ReShape Balloon. SUF, ¶¶ 18-22; Bhoyrul Dec. ¶¶ 112-113. Following
8 the filling of the balloons with fluid through the valves, a valve sealant is injected
9 to seal [REDACTED]. SUF, ¶ 22; Bhoyrul Dec. ¶ 114. This valve sealant further
10 ensures that fluid cannot flow out of the flapper valve once fluid flows through it.
11 Bhoyrul Dec. ¶ 114.

12 A POSITA would understand [REDACTED], and fill
13 tubes to constitute a valve system. *Id.* The valve system is sealed with valve
14 sealant, which can be considered part of the valve system. *Id.* The valve system
15 retains the fluid in the ReShape Balloon once the balloons of the device are
16 inflated. *Id.* ¶ 115.

17 **d. Third element**

18 The third element of claim 1 of the '367 patent recites "a flexible member
19 spanning a gap between and fixedly attached to both a first chamber of the at least
20 two isolated non-concentric inflatable chambers and a second chamber of the at
21 least two isolated non-concentric inflatable chambers, said flexible member
22 carrying inflation tubes that are in fluid communication with the at least two isolated
23 non-concentric inflatable chambers." SUF, ¶ 10. A POSITA would understand the
24 words of this claim limitation according to their plain and ordinary meaning without
25 the need for further construction. Bhoyrul Dec., ¶ 117.

26 A POSITA would recognize this claim limitation as literally present in the
27 ReShape Balloon. Bhoyrul Dec., ¶¶ 118-125. The ReShape Balloon includes a
28

1 “central silicone shaft” that is attached to the balloons and spans a gap between the
2 two balloons. SUF, ¶ 32; Bhoyrul Dec., ¶¶ 119-120. The central silicone shaft is
3 flexible. *Id.*; *id.* The flexible central silicone shaft runs through the length of the
4 balloon device acting as a spine. SUF, ¶ 35; Bhoyrul Dec., ¶ 120. The central
5 silicone shaft connects the two balloons in the ReShape Balloon. SUF, ¶ 33;
6 Bhoyrul Dec. ¶ 120.

7 The central silicone shaft of the ReShape balloon [REDACTED]

8 [REDACTED].
9 SUF, ¶ 46, Bhoyrul Dec., ¶¶ 122-125. The [REDACTED]
10 [REDACTED] are used to fill fluid into
11 the balloons of the ReShape Balloon. SUF, ¶ 47; Bhoyrul Dec., ¶¶ 122-125.

12 **e. Fourth element**

13 The fourth limitation of claim 1 of the ‘367 patent recites “wherein the gastric
14 balloon structure is configured to float freely in the patient’s gastric cavity and is
15 not connected to any catheter, lumen or tether after deployment in the patient’s
16 gastric cavity;” SUF, ¶ 10. A POSITA would understand the words of this claim
17 limitation according to their plain and ordinary meaning without the need for further
18 construction. Bhoyrul Dec., ¶ 127.

19 A POSITA would recognize this claim limitation as literally present in the
20 ReShape Balloon. Bhoyrul Dec., ¶¶ 128-129. The ReShape Balloon is a free-
21 floating, untethered gastric balloon structure that is deployed in a gastric cavity of
22 a patient and is not connected to any catheter, lumen, or tether after deployment.
23 SUF, ¶¶ 44-45; Bhoyrul Dec., ¶¶ 128-129.

24 **f. Fifth element**

25 The fifth element of claim 1 of the ‘367 patent recites “wherein the gastric
26 balloon structure, in its inflated state, assumes a curved shape conforming to a
27 natural three-dimensional kidney shape of the gastric cavity, such that the flexible

1 member flexibly conforms, upon at least partially filling the at least two isolated
2 non-concentric inflatable chambers, the gastric balloon structure to the natural
3 three-dimensional kidney shape of the gastric cavity.” A POSITA would understand
4 the words of this claim limitation according to their plain and ordinary meaning
5 without the need for further construction. Bhoyrul Dec., ¶ 131.

6 A POSITA would recognize this claim [REDACTED]

7 [REDACTED] L [REDACTED]
8 [REDACTED] ReShape Balloon is inflated after
9 it is implanted into the patient’s stomach.

10 SUF, ¶ 14. When the device is inflated it
11 takes a curved shape as shown in the figure
12 to the right. SUF, ¶ 14; Bhoyrul Dec., ¶¶
13 129-131. When inflated, the ReShape

14 Integrated Dual Balloon Assembly is
15 designed to occupy a significant portion of the stomach
16 while conforming to the natural shape and contour of the
17 patient’s stomach. SUF, ¶¶ 24-26; ¶¶ 49-59; Bhoyrul
18 Dec. ¶¶ 132-134. As the image on the right shows, the
19 flexible central spine of the ReShape device bends and
20 conforms the device to the shape of the patient’s
21 stomach. SUF, ¶¶ 37-38; Bhoyrul Dec., ¶¶ 132-134. In
22 fact, ReShape has represented that ReShape Balloon is
23 [REDACTED]



Fig. 2

24 [REDACTED] SUF, ¶ 55.

25 In sum, the foregoing establishes by a preponderance of the evidence that
26 each and every element of claim 1 of the ‘367 patent is literally present in the
27 ReShape Balloon when that claim is properly understood according to its plain and
28

1 ordinary meaning. No reasonable juror could find otherwise, and summary
2 judgment of infringement as to claim 1 of the ‘367 patent is therefore appropriate.

3 **C. Defendants infringe dependent claims reciting that the same type
4 of fluid is used to fill the compartments or chambers.**

5 Dependent claim 11 of the ‘930 patent, dependent claim 7 of the ‘367 patent
6 both depend from claim 1 of those patents (discussed above) and recite that the
7 space-filling compartments or inflatable chambers are filled with the same fluid.
8 SUF, ¶¶ 83, 84 The balloons of the ReShape Balloon are filled with the same fluid,
9 i.e. saline. SUF, ¶ 85. Accordingly, the ReShape Balloon infringes dependent claim
10 11 of the ‘930 patent, dependent claim 7 of the ‘367 patent.

11 **D. Defendants infringe claims 5 and 6 of the ‘930 patent.**

12 Claim 5 depends from claim 1 and recites “wherein an outer surface of each
13 of the inflatable space-filling compartments aligns against greater and lesser
14 curvatures of the stomach.” The outer surface of the left side of the balloon aligns
15 against the lesser curvature of the stomach and the outer surface of the right side of
16 the balloon aligns against the greater curvature of the stomach. SUF, ¶ 37; Bhoyrul
17 Dec., ¶¶ 54-57. Accordingly, Defendants infringe claim 5 of the ‘930 patent

18 Claim 6 depends from claim 5 and recites “the obesity treatment device of
19 claim 5, wherein the obesity treatment device is untethered in the stomach after
20 inflation.” The ReShape Balloon is a free-floating, untethered gastric balloon
21 structure that deployed in a gastric cavity of a patient unconnected to any catheter,
22 lumen, or tether after deployment. SUF, ¶¶ 44-45; Bhoyrul Dec., ¶¶ 128-129.

23 **CONCLUSION**

24 For the foregoing reasons, Fulfillium respectfully requests that the Court
25 grant its motion and enter an order awarding partial summary judgment of
26 infringement.

1 Dated: July 9, 2019

2 Respectfully submitted,

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PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OF
INFRINGEMENT

8:18-CV-1265-RGK-PLA

1 **CERTIFICATE OF SERVICE**

2 This is to certify that a true and correct copy of this document has been
3 served on all parties through counsel of record on July 9, 2019 via the Court's
4 CM/ECF system.

5 /s/ W. Cook Alciati
6 W. Cook Alciati
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PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OF
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8:18-CV-1265-RGK-PLA